# No. 14,959

# United States Court of Appeals

## For the Ninth Circuit

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AMERICAN PRESIDENT LINES, LTD.,
a corporation,
*Appellant,*

vs.

MARINE TERMINALS CORP.,
a corporation,
*Appellee.*

**Appeal from the United States District Court for the Northern District of California, Southern Division.**

## APPELLEE'S REPLY BRIEF.

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### I.

### STATEMENT OF FACTS.

We feel that Appellant's Statement of Facts in fairness to our position requires a more complete statement of certain essential facts. This is particularly true due to omission of certain facts without which a complete presentation of the issues cannot be had.

On January 29, 1952, the President "Polk" was in San Francisco, and the agents, servants and em-

ployees of Appellee, Marine Terminals Corporation, went aboard the vessel for the purpose of discharging the vessel's cargo.

There was a written stevedoring contract between the parties. (Plfs. Ex. 16, Tr. 48.) This contract contained *no* agreement, covenant or language for indemnity.

When the vessel arrived in port some of the strong backs or hatch beams were entirely devoid of locking devices (Tr. 289). This information was conveyed by the mate of the vessel to Ernest Bleile, the walking boss for the Appellee (Tr. 288-289). Mr. Bleile then instructed the gangs to remove excess beams from No. 1 hatch and to place them on deck. He also issued instructions to remove *any unsafe beams that might be found.* (Tr. 293.) It is undisputed that the mate of the vessel did not specifically call attention to or point out any particular beams which lacked locking or safety devices. The mate merely reported to Mr. Bleile:

> "That he would like me to remove all excess beams, which I didn't use for handling cargo, because he had some beams on the ship which had faulty locking devices." (Tr. 289.)

Asked more specifically concerning this conversation with the first mate, Mr. Bleile said (Tr. 289):

> "He called me below. He said, 'Will you keep your eyes open? I believe I have strong backs here which have no locks.' "

On the second day, January 30, 1952, work continued and one defective hatch beam on the tweendeck

n Number One Hold *which did not have any locking devices* thereon was dislodged without negligence on his part by the bridle and hook of the winch driver, Paquette, and fell into the lower hold causing severe personal injuries to the stevedore, Mr. Williams. (Tr. 115, 116, 126.)

The operation of the winch operator, Mr. Paquette, who testified on behalf of the plaintiff, reveal that the cause of the accident was the lack of the locking device (Tr. 164) and that had the locking device been on the beam the bridle and hook could not have dislodged it, that very little weight is required to dislodge an unlocked strong box, (Tr. 164) and that it was the sole duty and responsibility of the ship to "*install* the lock" (Tr. 168) and that the locks used in the case at bar were part of the strong back (Tr. 168). This testimony is corroborated by the plaintiff's witness, Mr. Reuben Swanson. (Tr. 189.)

It is, likewise, undisputed that the bridle and hook, used by Mr. Paquette, the winch operator, was being used in a normal and usual manner with a swinging motion (Tr. 155, 157, 158) as the ship was not on an even keel and that he did not know that the strong back lacked a locking device, until after the accident. (Tr. 164.)

In Appellant's Statement of Facts (Opening Brief p. 5) much is made of the point that Mr. Paquette would have preferred to have had more than one hatch open (Tr. 156). But the fact remains that the only eyewitness to the accident, Mr. Paquette, did definitely state that had the locking device been on

the strong back, the accident could not have occurred. (Tr. 164.)

There is no dispute in the evidence that it was the duty of the ship to supply, repair, install and maintain the locking devices. (Tr. 168.) The evidence is, likewise, conclusive that the ship owner did not supply any substitute locking devices or other equipment for the purpose of securing the hatch beam in question.

There were certain Marine Safety Code Regulations which placed reciprocal duties on both the ship and the stevedore to make gear and working conditions safe. Rule 201 (Plfs. Ex. 18) (Tr. 283) required the owners or operators of the ship to provide safe ships' gear and equipment and a safe working place for all stevedoring operations on board ship. Other safety regulations placed similar duties on the part of the employer stevedoring company.

These are the essential facts concerning the contract, the accident and the reciprocal duties of the ship and the stevedoring company.

The trial Court made certain findings of fact consisting of eighteen separate findings (Tr. 32-35) the most pertinent being as follows:

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## II.

### FINDINGS OF FACT.

"I. On January 29, 1952, plaintiff's vessel, President Polk, was in San Francisco for the pur-

poses of loading and unloading cargo. That the defendant, Marine Terminals Corporation, pursuant to a written stevedoring contract went aboard for the purpose of discharging the ship's cargo.

2. That the stevedoring contract, between said parties contained no agreement, covenant or language of indemnity.

3. That at the time of the arrival of said vessel in San Francisco, and prior to the defendant going aboard for the purpose of discharging the vessel's cargo, there was a missing locking device on the number 2 King strongback in the lower 'tween deck hatch.

4. That the plaintiff knew and was aware of the absence of locking devices on some of the strongbacks on the vessel and communicated this information to the defendant.

5. That plaintiff's chief officer had on January 29, 1952, communicated to defendant's walking boss, Ernest Bleile, a warning that some beams aboard the vessel might lack locking devices and cautioned him to remove any defective beams.

6. That at the time of the accident, only one section of the three sections of the lower 'tween deck hatch square was open.

7. That on the second day of the unloading of the cargo of said vessel, the defendant's winch driver, Mr. Paquette, dislodged a strongback by bridle and hook being manipulated by him in the cargo unloading operations. That upon becoming dislodged said strongback fell into the lower hold striking and causing personal injuries to Mr. Williams, a stevedore employee of the defendant.

8. That the winch driver, Mr. Paquette, had prior to, and at the time of the dislodgement of said hatch beam, been using, operating and manipulating the bridle and hook in the usual and customary manner and free of any negligence whatsoever.

9. That the main purpose of locking devices of strongbacks is to prevent the dislodgement of strongbacks by being caught or hooked by the bridle and hook used in loading and unloading operations.

10. That had said strongback been equipped with a locking device, it would not have become dislodged and in fact could not have become dislodged by the said bridle and hook used in said loading or unloading operations.

11. That it was the duty of the vessel's owners (plaintiff herein) to supply, repair and maintain the locking devices used on said hatch beam.

12. That plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks."

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## III.

### CONCLUSIONS OF LAW.

The Trial Court made certain Conclusions of Law based on the Findings of Fact. These Conclusions were as follows (Tr. 35-36):

"1. That both of the parties, plaintiff and defendant, were jointly and concurrently negligent

in the premises, which joint and concurrent negligence caused the accident and resulting injuries to Mr. Williams, the stevedore.

2. That the joint and concurrent negligence of the said parties consisted of negligence on the part of both of them in that the ship-owner knowingly supplied a hatch beam totally lacking a locking device; and both of said parties with full knowledge of said lack of a locking device permitted the unloading and loading operations to be performed, without repairing or replacing said locking device, or without removing said hatch beam.

3. That both parties well knew or should have known from experience that a hatch beam totally lacking in locking devices could be easily and upon even slight contact with the bridle and hook, used in loading and unloading, become dislodged and fall and cause serious injury to any person upon whom said hatch beam might fall.

4. That the concurring negligence of the ship-owner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work.

5. Although Mr. Williams' (the stevedore) injuries proximately resulted from the joint and concurring negligence of the ship (plaintiff) the stevedoring company (defendant), plaintiff's demand for indemnity against the defendant must be denied upon the authority of *American Mutual Liability Ins. Co. vs. Mathews,* 182 Fed. 2d, 332, 2 Cir., and *Halcyon Lines vs. Haenn Ship Refitting Corp.,* 342 U.S. 382.

6. That plaintiff is not entitled to recover from the defendant, upon its action for indemnity.

7. That judgment be entered herein, upon these findings of fact and conclusions of law for the defendant.

8. That each party pay their own costs in this action incurred."

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## IV.

### SUMMARY OF ARGUMENT.

A reading of Appellant's Specifications of Error and Summary of Argument seems to be based primarily on its contention that:

A. That the stevedore contract, although containing no provision for indemnity, should be construed under the decision of our Supreme Court in *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.,* 100 L. Ed. Advance p. 146, as requiring indemnity irrespective of Appellants own joint and concurring negligence. (Spec. of Error No. 1.)

B. That the *sole* cause of the accident was the negligence of appellee as contrasted to mere unseaworthiness of the vessel supplied by Appellant. (Spec. of Errors Nos. 2-9.)

C. That the principles enunciated in the cases of *Halcyon Lines v. Haenn Ship Refitting Corp.,* 342 U. S. 282 and *American Mutual Liability Insurance Co. v. Mathews,* 182 Fed. 2d. 322 (2d Circuit) do not support the conclusions of law

made by the trial Court. (Spec. of Error No. 10.)
D. And finally that the Conclusions of Law 1, 2 and 5, to the effect that Appellant was jointly and concurrently negligent are not supported by the evidence and are inconsistent with Findings of Fact number 12. (Spec. of Error Nos. 11-15.)

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## V.

## ARGUMENT.

**A. APPELLANT'S SPECIFICATION OF ERROR NO. 1. THE RYAN CASE. (RYAN STEVEDORING CO. v. PAN-ATLANTIC S. S. CORP., (..... U.S. ....., 100 L.Ed. A. 146.)**

Our Supreme Court in this recent case held that no express covenant for indemnity is necessary to permit the recovery thereof where the contract itself has been breached. This obligation the Court said is comparable to a manufacturers' warranty of soundness of its manufactured product.

However, before any case can be properly evaluated the facts of the case should be discussed. The facts in that case reveal that the entire stevedoring operations and the resulting accident and injuries were the result of sole active negligence of the stevedore brought about while using *entirely its own equipment and in failing to properly secure certain bales with chocks or ropes* so that one of the bales (freight) toppled over on the stevedore. (Added emphasis ours.)

Contrast that situation with the case at bar. Here we have the cause of the accident clearly established as being an integral part of the ship's own equip-

ment—the hatch beam which was entirely devoid of any locking device and knowingly supplied by the ship owner. The activity of the Appellee stevedoring company was merely to unseat the hatch beam, without any negligence on their part in the normal use of the winch and bridle. (Tr. 115, 116, 126, 168.)

In the *Ryan* case nothing defective was supplied by the ship. No gear, apparatus or appliance owned or required to be supplied by the ship was involved in the accident whatsoever. The liability of the ship was based on *mere unseaworthiness of the vessel.*

Again in the case at bar not only was the instrumentality (defective hatch beam) which was the proximate cause of the accident and resulting injury knowingly supplied by the vessel (Tr. 288-289) but the sole duty to install the missing locking device was upon the ship owner, the Appellant herein. (Tr. 168.)

If the *Ryan* case meant what Appellant contends it would mean that irrespective of what participation the vessel owner might have in an accident—if there was a stevedoring contract, the stevedoring company must indemnify. Such was not the holding in the *Ryan* case we most respectfully contend and with the exception of its holding in respect to the effect of the Longshoreman Compensation Act, we do not see that it has any applicability to the instant case at all.

**The Mathews Case.**

The holding in the case of *American Mutual Liability Ins. Co. v. Mathews,* 182 Fed. 2d 332 is, we contend, the proper rule of law where the accident is in relation to defective equipment supplied by the ship. In that case the ship owner furnished a patently defective guy rope, which was negligently used by the stevedore. The Court in part said:

> "In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the ship owner to be used for the very purpose to which it was put, nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the ship owner against liability arising out of the ship owners' own negligence. In the *absence* of an express promise, such an implication would be utterly unreasonable, hence we can find no contractual basis for indemnity or contribution. To impose a non-contractual duty of contribution on the employer is pro tanto to deprive him of the immunity which the statute grants him in exchange for his absolute, although limited, liability to secure compensation to his employees."

To the same effect is the case of *Shannon v. U. S.,* 119 F. Supp. 706 (D.C.N.Y.); *Slattery v. Marra Bros.,* 186 F. 2d 134 (2 C.C.A. 1951); *Hawn v. Pope & Talbot Inc.,* 198 F. 2d 800 (3 C.C.A. 1952); *Halcyon Lines v. Haenn Ship Corp.,* 342 U.S. 283.

Hence the absence of an express promise for indemnity to protect the ship against the ship's own negligence, is the point of the *Mathews* case (supra), Without such a provision—no matter what negligence the ship owner or operator might be guilty of and no matter how gross or flagrant its negligence might have been, surely, no indemnity would lie in the absence of such provisions. We do not believe the *Ryan* case has changed this well established rule.

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### B. SOLE CAUSE OF ACCIDENT WAS NOT APPELLEE'S NEGLIGENCE.

The *sole cause* of the accident was not the negligence of Appellee. The evidence is uncontradicted that the strongback which fell was wholly devoid of locking devices and was known to be in such condition by Appellant (Tr. 289.) What was the proximate cause of the accident? The findings of fact of the trial Court that it was due to the lack of locking devices and became dislodged without negligence on the part of Mr. Paquette, the winch driver, (Findings of Fact 4, 5, 6, 7, 8, 9, 10, and 11 Tr. 33-34) supported the Conclusions of Law 1 to 6, of joint and concurring negligence on the part of both parties and "went well beyond a mere passive act of negligence based on a non delegable duty to furnish a seaworthy ship and a safe place to work." (Conclusions of Law No. 4, Tr. 36.)

**Appellant's Specification of Error No. 2.**

Specification of Error No. 2 is directed to the Findings of Fact Nos. 4 and 5 that plaintiff knew and was aware of the absence of locking devices on some of the strongbacks and communicated this information to defendant, (Tr. 33); and that plaintiff's chief officer had warned the defendant that some beams aboard the vessel might lack locking devices and cautioned Mr. Bleile, the walking boss, to remove any defective beams. (Tr. 33.) Not only was the evidence supporting these findings uncontradicted but, furthermore, was brought out by plaintiff's own witness. (Tr. 289.) It is also without dispute that *there was a complete absence* of locking devices on No. 2 strongback. (Tr. 115, 116, 126.) We cannot see, how, in face of this evidence Appellee can take the position that (Appellee's Brief p. 18) there was no negligence of the ship owner or (Appellee's Brief p. 20); there was sole negligence of the stevedore.

**Specification of Error No. 3.**

We feel that Specification of Error No. 3 concerning the customary operation and manipulation of the bridle and hook has been fully answered by the uncontradicted testimony of Mr. Paquette, which has been previously discussed by us in this Brief (p. 3) and needs no further argument, and that Findings of Fact No. 8, (Tr. 33) has been fully sustained by the evidence.

**Specification of Errors Nos. 4 and 5.**

Specification of Errors Nos. 4 and 5 are directed to (Appellee's Brief 24) the Court not finding that the defendant stevedore company failed to take proper precautions to suspend operations until the defective beam had been removed (Spec. of Error No. 4) and that the winchman, and other employees of the defendant violated certain provisions of the Safety Code. (Spec. of Error No. 5.)

The argument on this point is primarily based on the applicability of Rules 205, 207, 824 and 826, of the Marine Safety Code. (Exhibit 18.) These rules require a safe working place for the stevedore employees and outline certain precautionary duties all relating to safety. However, rule 201 (Exhibit 18) also spells out the duty and requirement that the owner or operators of the vessel are to provide safe ships' gear and equipment. In other words, it is clear that both the ship owners or operators and stevedores have reciprocal duties to try and prevent accidents by requiring the ship to furnish safe gear and equipment and the stevedore to operate with care and circumspection.

Assuming that both Appellant and Appellee were performing in violation of these rules in that *both* were jointly and concurrently negligent—as the findings of the trial Court specifically found, what would have been added or changed by making additional findings that each party violated certain safety code provisions? Such a findings would, if made, merely

have been a further or additional factor spelling out the joint and concurrent negligence of each party to this action.

**Specification of Error No. 6.**

Appellee's contention is that their only negligence was the mere supplying of an unseaworthy ship. The cases cited by Appellee such as *Valerio v. American President Lines,* 112, F. Supp. 202 (S.D.N.Y. and *Berti v. Compagnil etc.,* 213 Fed. 2d 397 (2nd Circuit) well support the rule concerning the supplying of an unseaworthy ship as being a non delegable duty and that where the *sole negligence or primary cause* of the accident is on the stevedore indemnity will be allowed. We do not contend to the contrary. But we do contend that the rule is otherwise—where the negligence of the ship goes past the mere supplying of an unseaworthy ship and clearly so when the ship has knowingly furnished defective gear. To impose indemnity for the ship's own joint and concurring negligence in knowingly furnishing hatch beams wholly lacking locking devices is not a mere "unseaworthy act."

The *American Mutual Liability Co. v. Mathews,* 182 F. 2d 332 (2 C.C.A.) and previously discussed in this brief clearly supports our position. In accord are;

*Slattery v. Marra Bros.,* 186 F. 2d 134 (2 C.C.A. 1951);

*Hawn v. Pope & Talbot Inc.,* 198 F. 2d 800 (3 C.C.A. 1952);

*Shannon v. U. S.,* 119 F. Supp. 706 (D.C.N.Y.);
*Halcyon Lines v. Haenn Ship Corp.,* 342 U.S. 283.

Some of these cases will be later in this Brief discussed.

**Specification of Errors Nos. 7, 8 and 9.**

These assignments are merely a restatement of Appellee's contention that their own negligence was only the supplying of an unseaworthy ship and (7) even if they were negligent there had been a supervening act of negligence on our part (8) that a right to indemnity exists even if appellant's negligence was more than the supplying of an unseaworthy ship and (9) that even in the absence of an indemnity provision the primary or active negligence on the part of the Appellee stevedore company was the proximate cause and the Appellant's negligence was merely inactive or passive.

The evidence has been reviewed and no useful purpose would be served in repeating that which has already been stated. The Trial Court has made Findings of Fact and Conclusions of Law, amply supported by the evidence that there was joint and concurrent negligence on the part of both parties (Tr. 32-36.)

The trial Court not only determined that the accident would not have occurred if the strongback had been equipped with a locking device (Findings of Fact No. 10) but further that it was the duty of the vessel's owners to supply, repair and maintain

the locking devices used in the loading or unloading operations (Findings of Fact No. 11), that the purpose of the locking devices or strongbacks is to prevent the dislodgement of strongbacks being caught hooked by the bridle and hook used in loading and unloading operations (Findings of Fact No. 9.)

The Court concluded that both parties were jointly and concurrently negligent in causing the accident. (Conclusions of Law No. 1); that such concurrent negligence consisted of negligence on the part of both parties; on the part of the ship owner in knowingly supplying the hatch beam without locking devices (Conclusions of Law No. 2.) That both parties knew or should have known by experience that a hatch beam totally lacking in locking devices could be easily dislodged (Conclusions of Law No. 3); *and that the concurring negligence of the ship owner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work.* (Conclusions of Law No. 4.) (Added emphasis ours.)

The cases cited by Appellant such as the *Ryan* case, *Brown v. American Hawaiian S. S. Co.,* 211 F. 2d 16 and others, and the Law Review article of the University of Pennsylvania; are not to the contrary. These cases are concerned with mere unseaworthiness, a non delegable duty or "liability without fault," and an analysis of each case on the facts would reveal that the Court was not considering cases of joint and concurring negligence where the very instrumentality causing the accident and

injury was knowingly supplied by the ship owner, nor, we respectfully contend, can the attorneys for appellants find such a case.

**Cases Cited and Relied Upon by Appellant.**

*Brown v. American Hawaiian S. S. Co.,* 211 F. 2d 16.

The facts reveal that the equipment causing the accident was supplied by the stevedore company and the only participation by the ship was unseaworthiness. We quote from the decision (p. 17.):

> "American-Hawaiian denied liability in its answer and filed a third party complaint against Brown's employer, Luckenbach, in which it asked for contribution and/or indemnity! The basis of this claim are two: (1) *that the equipment which caused the injury was furnished, installed, operated* and controlled by *and was the property of Luckenbach and that it was supplied pursuant to the stevedoring contract;* (2) that if Brown sustained injuries as a result of the unseaworthiness of any equipment aboard the vessel such unseaworthiness was caused by the negligence of Luckenbach." (Emphasis ours.)

*McFall v. Compagnie Maritime etc.,* 304 N.Y. 314, 107 N.E. 2d 463.

In that case drums of tetrachloride were roughly handled by the stevedore and were caused to leak emanating fumes causing injuries. The ship, Belgian Line, was guilty of no negligence whatsoever—merely unseaworthiness. Judgment was affirmed against the

stevedore company and Dow Chemical Company the manufacturer, due to alleged faulty packing.

*Davis v. American President Lines,* 106 F. Supp. 729 (N.D. Cal.). The court made no findings and the question of whether or not the Complaint in Intervention stated a cause of action was resolved. From the few facts that the opinion reveals it would appear that a gangway slipped off the wharf causing certain injuries and that the indemnitor United States "controlled the wharf and set the gangway in place." The Court said (p. 731):

> "The recent decision of the Supreme Court in *Halcyon Lines v. Haenn Ship and Refitting Corp.,* 342 U.S. 282, 72 S. Ct. 277, negated the right of contribution between joint tort feasors in non collision admiralty cases. See *Union Sulphur and Oil Corp. v. W. J. Jones & Son, Inc.,* 9 Cir. 195 F. 2d 93. If these are cases of concurrent negligence, Halcyon will prevent recovery on third party complaints. If they are cases involving indemnity, a different issue is posed. In either event, the question cannot be determined in the pleading stage."

*United States v. Arrow Stevedoring Co.,* 175 F. 2d 329, (C.C.A. 9). Several factors distinguish the case from the one at bar. First the Court said (p. 331):

> "The testimony is uncontradicted that in this defective condition of the dogs of the port hatch the cover could have been securely held erect by a clamp and turnbuckle attached to both starboard and port hatch doors. Such turnbuckle

> and gear was right there by the hatch for that purpose."

secondly, the owner (United States) did not have knowledge of the situation, and thirdly, there was an express contract of indemnity. The Court held as follows (p. 331):

> "On the facts we find that the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door with knowledge of its defects of dogs and pins. The government in no way participated in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow's Larsen. . . .
>
> Arrow's contract with the government provides for its liability to the government for such sole negligence in the following language;
>
> 'Article 26. Liability and Indemnity (b) The contractor shall be liable to the Government for any loss or damage . . . etc' ".

*Lukasiewicz v. Moore McCormick Lines,* 104 F. Supp. 572 (E.D.N.Y.) reveals a factual situation where a certain cable was *supplied by the contractor* in making ship repairs. Again we have the case of no negligence of the ship owner and a liability without fault predicated only on unseaworthiness created by the contractor.

*Raskin v. Victory Carriers,* 124 F. Supp. 879 (D.C. E.D. Penn.) clearly does not support appellant's position and emphatically supports our position. In that case *no facts* are set forth, however, the follow-

ng language of the Opinion is worthy of comment. The Court in part said (p. 880):

> "In the McFall case [107 N.E. 2d 471] the Court said that such implied contract of indemnity will arise . . . Whether negligence is passive or active, is, generally speaking, a question of fact for the jury."

We are in agreement that that issue was for the rial Court to determine (serving as the sole juror) nd his findings and conclusions were adverse to the osition of appellee as we have heretofore pointed ut. Such findings should be sustained unless some bvious error of law has intervened or some serious nistake of fact has been made. *Wingate v. Bercut,* 46 F. 2d 725 (C.C.A. 9th.) Accord, *State Farm Mutual Auto. Ins. Co. v. Coughron,* 92 F. 2d 239 (C.C.A. 9th.)

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### C. PRINCIPLES OF CASES RELIED UPON BY TRIAL COURT.

**Specification of Error No. 10.**

As we understand the argument of appellee it is heir contention that the several cases cited by the rial Court in its Conclusions of Law do not support such findings being "contribution cases." They further assert that these cases support appellee's position. Needless to say, we cannot agree with them. Their argument (Apellee's Brief p. 35-38) is, in our opinion, somewhat difficult to follow. We gather that heir main contention is based on their belief and contention (which is the main point throughout their

Brief) that the facts of the case at bar shows sole negligence on Appellee's part and mere liability without fault based on unseaworthiness on appellant's part. This has been thoroughly discussed and we will not repeat the evidence and findings on this question.

The only question that is pertinent on this question (Spec. of Error No. 10) is not what cases the trial Court cited but what is the law on the subject. Whether the trial Court cites any decisions in its findings, opinions or conclusions of law, is not material, if the findings, opinions and conclusions are legally sustainable and sound. Such rule, we contend is so elementary that no citation of authority is necessary.

There are many cases which support the judgment of the trial Court in addition to the two cases cited in Conclusion of Law No. 5. (Tr. 36.)

Additional cases supporting the trial court are as follows:

*States S. S. Co. v. Rothschild Int'l Stevedoring Co.,* 205 F. 2d 253 (C.C.A. 9th);

*Seas Shipping Co. v. Sieracks,* 328 U.S. 85;

*Union Sulphur and Oil Corp. v. Jones & Son,* 195 F. 2d 93 (C.C.A. 9th);

*Slattery v. Marra Bros.,* 186 F. 2d 134 (C.C.A. 2d);

*Johnson v. U. S.,* (D.C. 79 F. Supp. 448;

*Hawn v. Pope & Talbot Inc.,* 198 F. 2d 800 (C.C.A. 3rd);

*Shannon v. U. S.,* 119 F. Supp. 706 (D.C.N.Y.).

The *American Mutual v. Mathews* case (supra p. 11 ur Brief) has been heretofore discussed and the ourt held that neither contribution *or indemnity* s recoverable "where the ship owner joined in the rong doing in supplying a defective appliance to ie employee's stevedore."

This Opinion was quoted with approval by Judge )enman in the *States S. S. Co. v. Rothschild* case 05 F. 2d 253 where he said:

> "However, the opinion of the Supreme Court speaks only of contribution as between joint tort feasors. Here we do not have joint tort feasors, but rather one party who is alleged to be solely at fault and another party who is alleged to be liable without fault as a result of the others acts. In *American Mut. Liability Ins. Co. v. Mathews,* 182 F. 2d 332, at page 234, the ship owner joined in the wrong doing in supplying a defective appliance to the employee's stevedore. The holding is that an owner so acting cannot recover. The Court's reasoning clearly warrants the inference that if the ship owner had been free of wrong doing, the quasi contractual obligation not to cause liability in the ship owner would exist.

Furthermore, the Halcyon and the instant case are distinguishable upon their facts. Halcyon was an attempt by a ship owner to bring a ship repair company in as a third party defendant in an action by an employee of the latter against the former on the ground that the ship repair company's negligence had contributed to the injuries of its employee. Here, the libellant (appellant) alleged that it was not at fault, that

> it was liable only because of its non delegable duty to furnish a stevedore a seaworthy ship and a safe place within which to work under the doctrine of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, a species of absolute liability regardless of fault."

The Court then goes on to liken the absolute duty of a ship owner to provide safe places for longshoremen to work as to the absolute duty of a land owner to keep his premises in a safe condition, and cites the case of *Gray v. Boston Gas Light Co.,* 114 Mass. 149 wherein it was held that where the city grants permission to a third person to excavate the streets, that the city would be liable for its failure to inspect the streets but might recover over from a third person *if it was not itself actively negligent in creating the unsafe condition.*

Again the Court states in its opinion in part as follows:

> "Here it was clearly foreseeable that if the stevedore company made the ship unseaworthy, causing injury to a stevedore employee, the owner would be liable to the employee for the full amount of his injury under the case of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85."

Again the Court in quoting from the Restatement of Restitution says:

> "The Restatement of Restitution §76 states the general rule thusly: 'a person who, in whole or in part, has discharged a duty which is owed by him which as between himself and another should have been discharged by the other, is

entitled to indemnity from the other, *unless the payor is barred by the wrongful nature of his conduct.*"

It is, therefore, obvious that in the Rothschild case hat the facts which are not set forth in the opinion, ıust have revealed the *lack of fault* on the part of ıe ship owner and likewise, a lack of *joining in the rongful supplying of a defective appliance,* and ırther that the ship owner was not a party in the ctive tort which was committed. Again it is clear rom the opinion in the Rothschild case that the Court as considering a factual situation wherein the steve- ore company *made the ship unseaworthy.*

*Union Sulphur and Oil Corporation v. Jones & on,* 195 F. 2d 93 (C.A. 9, 1952) clearly supports the ndings and conclusions of the trial court.

Because of the lack of any understandable state- ent of facts in the opinion, it is necessary to look the Apostles on Appeal to find the facts so that ıe decision may be properly evaluated. The findings f fact reveal the following. The libellant was an mployee of the stevedoring company, Jones & Son. he ship of the claimant was being unloaded under stevedoring contract with Jones. The libellant was escending a steel ladder permanently fastened to the fter portion of number three hatch when one of the ungs of the ladder, unseaworthy at the time of the ccident, gave way and precipiated the libellant into ıe hold causing severe injuries. We quote from a ortion of the findings of fact of the trial judge hich include the following:

"The Court finds that the weld by which the steel run was welded to the vertical uprights of the ladder was defective. However, prior to the day of the accident the weld, although defective, had supported many men who had used the ladder for climbing in and out of the hold, and the Court finds that at the time the vessel was turned over to the stevedore company for the purpose of discharging the cargo the weld was sufficiently strong to support men heavier than libelant climbing up and down and using the ladder, and that the ladder could have been used by men climbing up and down it, and the accident would not have occurred except for a further weakening of the ladder caused by the impleaded respondent as hereinafter set forth. The court finds that prior to the accident the impleaded respondent stevedore company, in connection with the discharging of the sulphur, had used a clam-shell bucket and had also used a drag to drag the sulphur from the wings and trunks of the hatch into the square of the hatch and had used wire cables known as drag lines for the purpose of pulling the drag into the square of the hatch, and had also used drag lines and blocks for the purpose of obtaining favorable leads to the drag. The Court finds that the impleaded respondent stevedore company had, prior to the accident, used the ladder for obtaining leads to its drag lines. This placed heavy and excessive strains upon the ladder at and near the point where the rung gave way and also caused it to shake and vibrate excessively and caused the ladder to be further weakened and loosened at said point. The ladder, which was part of the permanent structure of the ves-

sel, was not designed or intended to be subjected the heavy and excessive strains which were placed upon it by impleaded respondent stevedore company. It was not good stevedoring practice for the stevedore company to use the ladder for this purpose and to subject it to heavy and excessive strain and vibration by means of its drag lines.

The court finds that the accident and libelant's injuries were proximately caused by the defective weld by which the rung was welded to the uprights of the ladder, combined with the further weakening and loosening of the rung resulting from the stevedore company's improper use of the ladder. The court finds that the vessel was unseaworthy in that the weld of the rung to the uprights of the ladder was defective, but that this unseaworthiness would not itself have caused the accident except for the joint and concurring negligence of the impleaded respondent stevedore company in causing the rung to be further weakened and loosened.

The court finds that libelant's injuries were proximately caused by the joint and concurring negligence of the vessel Herman Frasch and of the impleaded respondent, W. J. Jones & Son, Inc."

(Findings, Paragraphs IV, V, VI, and VII.)

There are no findings with reference to negligence the part of the claimant excepting as hereinabove t forth.

The conclusions of law deduced by the trial judge e as follows:

"1. The respondent vessel Herman Frasch was liable to libelant for the full amount of his damages.

2. The amount paid by claimant and petitioner Union Sulphur and Oil Corporation to libelant in full settlement of libelant's claim was not in excess of a reasonable amount for the libelant's damages.

3. Libelant's injuries proximately resulted from the joint and concurring negligence of the ship (and its owners, claimant and petitioner) and the impleaded respondent, W. J. Jones & Son, Inc.

4. Although libelant's injuries were proximately caused by the joint and concurring negligence of the ship and the impleaded respondent, claimant and petitioner's demand for indemnity or conbution over and against the impleaded respondent should be denied upon authority of *American Mut. Liability Ins. Co. v. Mathews*, 182 F. 2d 332, 2 Cir. and in conformity with *Johnson v. U. S.* 79 F. Supp. 448 (1948).

5. The claims of the libelant have already been fully discharged and satisfied by claimant and petitioner through payment of $6110.00 in compromise settlement. The impleaded respondent W. J. Jones & Sons, Inc., is entitled to a decree dismissing the claim of claimant and petitioner for contribution or indemnity, and the impleading petition should be dismissed with prejudice and without costs to any of the parties."

The apostles on appeal do not contain the evidence which was introduced in the trial Court. They contain a pre-trial order, the findings of fact, conclusions of law and the decree. Therefore, the United States Court of Appeals did not have the testimony of the witnesses before it on the appeal. Its reference to the "facts proven" must refer to the findings of fact

nd the admissions contained in the pre-trial order. Vith this in mind, what the Court said is quite impor- ant:

> "We agree with the District Court that upon the facts proven the court properly found that the negligence of Union Sulphur and Jones, Inc., jointly caused the injury to Marshall. Hence, our decision in the Rothschild case is not applicable."

It, therefore, appears quite obvious from the find- ngs of fact that the injuries to the injured stevedore ere proximately caused by the defective weld with hich the rung was welded to the uprights of the dder, combined with the further weakening and osening of the rung resulting from the stevedore ompany's improper use of the ladder and further at the vessel was unseaworthy in that the weld of e rung to the uprights of the ladder was defective, ut that this unseaworthiness would not of itself ave caused the accident except for the joint and oncurring negligence of the stevedore company in ausing the rung to be further weakened and loosened. his appears to be the most important finding in the ecord. Therefore, it is obvious that the owner in the *nion Sulphur* case did *nothing* whatever with refer- nce to the ladder from the time the work started ntil the time of the accident. Therefore, it might be aid that its attitude throughout was *passive*. It did, owever, furnish a vessel for the doing of the work hich was equipped with a defectively welded rung f a ladder. There was not even anything in the ecord (unlike the case at bar) which suggests that the

ship owner had any actual knowledge of the defective weld at any time before the accident happened. If there is a finding of negligence on the part of the ship owner contained in the findings of fact it can be based only upon the ground that the ship owner by the exercise of ordinary care *could* have ascertained that the weld was defective, or that the *act* of furnishing a ladder with a defective weld was *active* negligence. The latter would seem to be the construction placed upon the findings of fact by the Ninth Circuit because it specifically refers to the case of *American Mut. Liability Ins. Co. v. Mathews,* 2 Cir., 182 F. 2d 332, upon which the trial judge relied and which in effect is cited with approval by our Circuit Court of Appeals.

**Was One Wrong Completed and a New Supervening Cause Added?**

The rule of "intervening force" discussed by appellant in its brief (pp. 32-35) is not applicable to the facts of the instant case. While it is true as stated in the Restatement of Torts, Sec. 441 (Appellant's Brief p. 32) an intervening force may turn a harmless situation into an injurious force. Nevertheless, such intervening force may, or may not, be a superseding cause and the absence of locking devices was not a "harmless situation". If it is a "contributory factor" in producing harm then both parties are concurrently liable. The rule is well expressed in Restatement of Torts Sec. 441(d) as follows:

> "The active operation of an intervening force may, or may not, be a superseding cause which relieves the actor from liability for another's

harm occurring thereafter. Whether it has this effect is determined by the rules stated in § 442-453. A force due to an act of a third person which is wrongful towards the other who is harmed may be a contributory factor in producing the harm. If so, both the actor and the third person are concurrently liable. This is so, although the actor's conduct has ceased to operate actively and has merely created a condition which is made harmful by the operations of the intervening force set in motion by a third person's negligent or otherwise wrongful conduct. However, while there is concurrent liability, the two forces are not concurrent causes as that term is customarily used. To be a concurrent cause, the effects of the negligent conduct of both the actor and the third person must be in active and substantially simultaneous operation. (Sec. § 439)."

Sec. 439( Restatement Torts) states the rule as follows:

"If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operations on the effects of a third person innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor for liability.

Comment:

(a) Although in the great majority of cases to which the rule stated in this Section is applicable, the effects of the conduct of both the actor and the third person are in simultaneous active operations, it is not necessary that their operation be absolutely simultaneous. It is enough that the two are in substantially simultaneous operations,

as when the effect of the conduct of one or the other has ceased its active operation immediately before the other's conduct takes active effect in harm to another."

Section 452 (*Restatement of Torts*) Third Person's Failure to Prevent Harm, states the rule as follows:

"Failure of a third person to perform a duty owing to another to protect him from harm threatened by the actor's negligent conduct is not a superseding cause of the others harm."

The Restatement of Torts on the question of causation contains 32 sections and consumes sixty-nine pages. One may not pick out an isolated statement to prove a rule.

Section 442 of the Restatement lays down six "important" considerations or tests to be applied in determining whether an intervening force is a superseding cause all of which means that the findings of the trial Court that there was joint and concurrent negligence is amply sustained under the rules of the Restatement under the facts of the case at bar.

The *California Court in Werkman v. Howard Zink Corp., et al.,* 218 Pac. 2d 43, 97 C.A. 2d 418 held the owner of a building who had negligently constructed an overhead garage door so that it would extend onto an alley-way while closing to be a concurring cause with that of the tenant who closed the door when a pedestrian was walking by causing injuries. Both owner and tenant were held liable.

The *Michigan Court in Brackins v. Olympia,* 316 Mich. 275, N.W. 2d 197 held the owner of a skating

nk jointly and concurrently liable where the injured arty was "clipped" by another person, where the ating rink was uneven.

In *Slattery v. Marra,* 186 F. 2d 134 (2 C.C.A.) idge Hand stated the rule as follows (p. 136):

> "Obviously, the jury was justified in finding that a reasonable person who thought about it at all, would realize that a gang of stevedores who had to open such a door and found it fastened as it was, might well take the chance of using it as it was. *The intervening wrong of a third person is no longer considered a 'breaking the casual chain', or making the first wrong a 'remote', and not a 'proximate' cause, for all those preceding events, without which any later event would not happen are 'causes'".* (Citing section 449 of the Restatement.) (Added emphasis ours.)

A complete discussion of the rules of causation, roximate cause and intervening cause is found in the se of *Mosley v. Arden Farms Co.,* 26 C. 2d 213, 157 . 2d 372, where the Supreme Court of California views the authorities on this subject and the Re-atement and concludes in accord with our position the matter that an intervening agency does not reak the chain of causation where that which oc-irred was reasonably foreseeable and should have en anticipated.

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**D. THE CONCLUSIONS OF LAW 1, 2 AND 5.**

**pecification of Errors Nos. 11, 12, 13, 14 and 15.**

The Specification of Errors concern the conclusions the trial Court that both parties were jointly and ncurrently negligent and that (Conclusion of Law

No. 4) the concurring negligence of the ship owner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work.

It is appellant's contention that the (A) evidence does not support the conclusion and (B) that the Conclusion of Law No. 4 is in conflict with Findings of Fact No. 12.

Without again discussing the testimony of the witnesses Bleile (Tr. 289) it should be sufficient to point out that his testimony concerning his conversation with Chief Officer Hogan of the ship concerning the absence of locking devices on the strongbacks is uncontradicted. No one from the vessel President Polk, or any officer, (including Mr. Hogan) appeared to testify to the contrary or to refute the inescapable fact that the ship had knowledge of the absence of the strongback locks prior to the accident.

Finding of Fact No. 12 that plaintiff's negligence "was passive" (Tr. 34) is merely a descriptive phrase which is in no way contrary or inconsistent with the other Findings of Fact and Conclusions of Law. The trial Court made eighteen Findings of Fact and Eight Conclusions of Law and they must be construed as a whole.

We do not believe that there is any inconsistency as the ultimate finding of the trial Court (Conclusion of Law No. 4) is controlling and conclusive on the question, even if it be argued that there was an inconsistency and we again state that there is no inconsistency.

No cases are cited by appellant in support of their ntention and we submit that the cases on this point re clearly opposed to their position. The rule is ell stated by this court.

In *Winnett v. Helvering* 68 F. (2d) 614 (C.C.A. 9) follows (p. 615):

> "We think the rule stated in 24 Cal. Jur. 972 § 205, is a correct statement of the general rule applicable as well in federal courts: § 205. Inconsistency Between Findings of Ultimate Facts and Probative Facts.—as a general rule findings of ultimate facts may not be impeached, controlled, limited or modified by findings of probative facts, but will control in case of any conflict between them. Findings of probative facts invalidate a finding of an ultimate fact only when the latter is based on the former and is entirely overcome thereby and when the findings of probative facts dispose of all the facts involved in the pleadings."

"Ultimate Facts" are defined in the California se of *New v. Mutual Benefit Health etc. Assn.* 24 al. App. (2d) 681 76 Pac. (2d) 131 as follows:

> " 'Ultimate Facts' are the logical conclusions, deduced from certain primary facts, evidentiary in character, and 'conclusions of law' are those presumptions or legal deductions which, the facts being given are drawn without further evidence."

In *Comm. of Int. Rev. v. Sharp* 91 F. (2d) 804 C.C.A. 3) the Court said:

> " 'Evidentiary facts' must be found from testimony and other evidence, while 'ultimate facts' are reasoned conclusions drawn from evidentiary

facts found, *but are likewise fact findings.* (Emphasis ours)

As to the effect of the findings made by the trial Court, the Appellate Courts have held as follows:

In *Rutan v. Johnson & Johnson* 231 F. 369 (C.C.A. 3) it was held that:

> "What matters are now subject to review by this court? Certainly we can reverse no finding of fact by the trial court, if the finding was supported by submissible evidence. It is not within our province to weight the evidence, his findings are like the verdict of a jury upon disputed facts, and are similarly conclusive in a court of appeal."

In accord:

*Luckenbach S. S. Co. v. Campbell,* 8 F. 2d 223 (C.C.A. 9);

*The Hermosa,* 57 Fed. (2d) 20 (C.C.A. 9).

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## VI.

### CONCLUSION.

1. The evidence supports the Findings of Fact and Conclusions of Law made by the trial Court that there was joint and concurrent negligence on the part of both parties herein, and that such negligence on the part of Appellant, American President Lines, went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and safe place to work.

2. That the findings and conclusions of the trial Court are based on substantial evidence and appel-

nt has not shown any error or abuse of discretion arranting contrary findings by this Honorable Court.

3. That indemnity should not be awarded to either the two parties who jointly and concurrently joined the sequence of events leading to the injury of r. Williams, where the contract between the parties ntained no indemnity agreement.

4. That the Findings and Conclusions of Law e supported by the decisions of the various federal nd state Courts who have passed on the question of int and concurrent negligence, when such concurnt negligence was more than a mere liability without fault or negligence.

For the foregoing reasons it is respectfully submitted that the Judgement of the District Court ould be affirmed.

Dated, San Francisco, California,
March 26, 1956.

Respectfully submitted,
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